No. 80-382

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In the Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL PUBLIC UTILITIES CORPORATION, ET AL.,
PETITIONERS

v.

SUSQUEHANNA VALLEY ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES NUCLEAR REGULATORY COMMISSION IN OPPOSITION

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Petitioners seek review of a decision of the United States Court of Appeals for the Third Circuit (Pet. App. 3a-29a) reversing in part the dismissal of a complaint for injunctive and declaratory relief concerning an aspect of the Three Mile Island accident cleanup. Although the United States Nuclear Regulatory Commission agrees with petitioners that the court of appeals erred in a number of its rulings and that its decision is contrary to prior decisions of this Court, the decision below does not, in the Commission's view, warrant this Court's intervention.

1. On May 25, 1979, the Susquehanna Valley Alliance ("SVA") instituted the present action in the United States

District Court for the Middle District of Pennsylvania against, *inter alia*, the Commission and petitioner utilities, which own the Three Mile Island, Unit 2, nuclear reactor ("TMI-2"). SVA alleged that the Commission had approved the construction and operation of EPICOR-II, a demineralizing and filtration system designed to decontaminate intermediate-level radioactive waste water resulting from the March 1979 TMI-2 accident, and intended to allow discharge of the treated water into the Susquehanna River, in violation of the Atomic Energy Act, the National Environmental Policy Act, the Clean Water Act and various provisions of the United States Constitution.

On that same day (and in response to a lawsuit raising virtually the same issues already pending in the United States District Court for the District of Columbia), the Commission issued a statement prohibiting the treatment or discharge of contaminated water, except for certain small routine operational releases, until completion of the preparation of an environmental assessment (Pet. App. 33a-34a, 44a-45a).[1] Noting the Commission's own action, the district court in this case denied a motion for a temporary restraining order. During the next several months, the NRC staff prepared an environmental assessment on the proposed operation of EPICOR-II, compiling through that informal process an

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[1]That lawsuit, *City of Lancaster* v. *NRC*, No. 79-1368 (D.D.C.), was settled and dismissed with prejudice on February 28, 1980, based on, *inter alia*, the Commission's adherence to its May 25, 1979 statement. As part of its cleanup program, the Commission has recently published a draft Programmatic Environmental Impact Statement on decontamination of TMI-2 for public comment (45 Fed. Reg. 54493 (1980)).

administrative record of several hundred pages (see Pet. App. 48a-49a).[2]

On October 12, 1979, while the Commission was still considering EPICOR-II operation, the district court dismissed the complaint for lack of subject matter jurisdiction on the ground of SVA's failure to exhaust its administrative remedies (Pet. App. 31a-42a). Specifically, the court held that SVA was required in the first instance to present its claims to the Commission, pursuant to 10 C.F.R. 2.206, which, the court found (Pet. App. 36a), "allows plaintiffs to ask [the Commission] for all the relief sought in this court," and that, thereafter, the final Commission decision would be reviewable exclusively in the courts of appeals (see 42 U.S.C. 2239; 28 U.S.C. 2342(4)). Accordingly, the district court dismissed the complaint without prejudice to SVA's right of recourse to the Commission.

Thereafter, the United States Court of Appeals for the Third Circuit reversed the dismissal of SVA's claims under NEPA, the Clean Water Act and the Constitution, but affirmed the dismissal of the Atomic Energy Act claim (Pet. App. 3a-29a).

2. In so holding, the court of appeals ignored "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303

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[2]On October 16, 1979, the Commission issued an opinion (Pet. App. 46a-60a) that permitted operation of EPICOR-II, but specifically prohibited any discharge of the decontaminated water into the Susquehanna River. SVA filed a petition for review of the EPICOR-II order in the court of appeals on December 13, 1979, No. 79-2800 (3d Cir.).

U.S. 41, 50-51 (1938). See *McKart* v. *United States*, 395 U.S. 185, 192-195 (1969). The gravamen of SVA's complaint is that the Commission would permit a licensee to process and discharge radioactive wastes into the Susquehanna River in violation of law and in derogation of the public health and safety and the environment. Since, as the district court found (Pet. App. 36a), the Commission possesses sufficient statutory authority to control its licensee's handling of radioactive materials to prevent the alleged harm, such allegations must be presented to the agency for resolution in the first instance. Because the Commission's final decision thereafter is reviewable exclusively in the court of appeals, the district court correctly dismissed the complaint.

Moreover, the court of appeals' holding that the Atomic Energy Act claim is reviewable exclusively in the court of appeals, while all other claims, which arise out of the same factual setting, are reviewable originally in the district court, splinters the structure for judicial review of the Commission's decisions (see *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 526-527 (1978)). This bifurcated review procedure—or, indeed, trifurcated, since it interrupts an ongoing administrative process—lacks practical utility, segregates what should be an integrated decisional process, and is contrary to the policy underlying direct review statutes. See *City of Rochester* v. *Bond*, 603 F. 2d 927, 934-937 (D.C. Cir. 1979); cf. *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 420-422 (1965).[3]

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[3]Contrary to SVA's assertions (Br. in Opp. 15-17 & n.*), it has been the Commission's consistent policy that its October 16, 1979 order approving operation of EPICOR-II is a final order reviewable under 42 U.S.C. 2239 and 28 U.S.C. 2342(4). See the Commission's Reply Brief in the court of appeals at 1-4. As explained therein, the

3. Notwithstanding the foregoing errors, however, we do not believe that the decision below warrants plenary consideration by this Court. The Third Circuit's decision orders no injunctive relief; it leaves intact the Commission's ongoing review of the proposed cleanup activities. While the court of appeals' decision unfortunately invites a duplication of effort at the judicial and administrative levels, we doubt that the reinstatement of three counts of the complaint in this case will have a significant precedential effect. Rather, the Third Circuit's decision will most likely be regarded as an anomaly that cannot be reconciled with this Court's settled teaching on exhaustion of administrative remedies. See *Schlesinger* v. *Councilman*, 420 U.S. 738, 756-757 (1975); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-71 (1970). To be sure, some aspects of the decision below leave unclear whether review of subsequent Commission orders will be on the basis of the administrative record, as required by *Camp* v. *Pitts*, 411 U.S. 138 (1973). That, however, is an issue that we believe can await the outcome of further proceedings on remand.

Commission's statement in its October 16, 1979 memorandum to the effect that Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a), was inapplicable thereto (Pet. App. 56a) refers only to the applicability of the requirement of a public adjudicatory hearing to its October 16, 1979 order, *not* to any intention that that order not be considered a "final order."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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